United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7533

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

P/S

TRAVELERS INDEMNITY COMPANY,

Plaintiff-Appellee,

—against—

S.S. POLARLAND, her engines, boilers, etc., D/S A/S VESTLAND, RICH. AMLIE & CO. A/S, & SEVEN SEAS SHIPPING CORP.,

Defendants.

S.S. POLARLAND,

Defendant-Appellee,

—against—

SEVEN SEAS SHIPPING CORP.,

Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE, TRAVELERS INDEMNITY COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF FOR PLAINTIFF-APPELLEE, TRAVELERS INDEMNITY COMPANY

Statement of the Case

This is an action by Travelers Indemnity Company as subrogee against the S.S. POLARLAND and Seven Seas Shipping Corp., to recover $30,802.93 it paid to an assured for damage to a shipment of steel.

The complaint was filed and served on September 6, 1972, Seven Seas Shipping Corp. answered on December 4, 1972. The S.S. POLARLAND and her owners D/S A/S Vestland answered on March 1, 1974 together with a cross-claim against Seven Seas Shipping Corp.

Trial was commenced on June 18, 1974 with Nimpex International Inc. as plaintiff. On November 26, 1974, the Travelers Indemnity Company was substituted for Nimpex as plaintiff. On August 17, 1976, Opinion No. 44979 (512a through 530a)* was filed awarding plaintiff the sum of $27,862.13** in damages to be recovered of defendants S.S. POLARLAND and Seven Seas Shipping Corp., jointly and severally and dismissing the complaint against D/S A/S Vestland, the vessel's owners and awarding S.S. POLARLAND the amount of the maritime lien against it as well as reasonable counsel fees from Seven Seas Shipping Corp.

On September 20, 1976, Judgment Order No. 76,844 (531a, 532a) was filed which awarded plaintiff $41,136.35 (covering damages, interest and costs) and S.S. POLARLAND, $10,000.00 as reasonable attorneys' fees incurred in the defense of the action from defendant-appellant, Seven Seas Shipping Corp.

On October 19, 1976, Seven Seas Shipping Corp. filed their Notice of Appeal (533a).

Issues Presented for Review

1. Did the Court below err in concluding that defendant-appellant, Seven Seas Shipping Corp., was the carrier of the allegedly damaged cargo?

2. Did the Court below err in concluding that defendant-appellant, Seven Seas Shipping Corp., issued for its own

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* References to the Joint Appendix are cited "a".

** The decision awarded plaintiff $30,802.93 in damages but was amended upon stipulation to conform to the $500.00 package limitation of the Carriage of Goods by Sea Act of 1936 (COGSA), Title 46 U.S.C. §1304(5).

account the bills of lading with respect to the allegedly damaged cargo?

3. Did the Court below err in concluding that defendant-appellant, Seven Seas Shipping Corp., was liable for the al[illegible]mage to the cargo?

4. Did the Court below err in concluding that the alleged damage to the cargo that appeared at off-loading was of a nature and source different from that noted at on-loading?

5. Did the Court below err in awarding attorneys' fees to defendant-appellee, S.S. POLARLAND?

Statement of Facts

On or about May 12, 1970, Nimpex International Inc. (hereinafter referred to as Nimpex) sold a shipment consisting of 299 Cold Rolled Steel Coils to Intereisen Stahlhandel GmbH of Dusseldorf, West Germany. The terms of the sale were "C.I.F./Free Out Antwerp". (Pl. Ex. 1, 534a). Nimpex was the only named assured under an open marine cargo policy, numbered LA 308 (535a through 543a) issued by Travelers Indemnity Company (hereinafter referred to as Travelers). By the terms of Clause 38 of the policy, Nimpex was permitted to issue special policies and/or certificates effecting shipments covered by the open policy. On May 11, 1970, Nimpex issued certificate No. 7335 pursuant to the terms of the open policy, which covered the shipment in question (544a, 545a). The certificate was endorsed in blank by Nimpex and it was negotiated together with the other shipping documents to the ultimate purchaser of the coils, Fabrique De Fer De Maubenge, Louvroll, France (hereinafter referred to as Fabrique De Fer), (308a, 313a, 314a).

The 299 coils arrived at the loading port, Cleveland, on or about April 21, 1970, and were delivered into the care and custody of the terminal operator/stevedore, Great Lakes International Corp. (hereinafter referred to as Great Lakes). Dock receipts were issued for the shipment with specific notations concerning the condition of the coils as they were received at the terminal, on each respective dock receipt (Pl. Ex. 18, 605a through 712a). The notations were as follows:

> DOCK RECEIPT NO. PC 752732
> COVERING 10 COILS—"COIL
> WRAPPINGS RUSTY & CHAFFED—
> CONDITIONS CONTENTS UNKNOWN"
>
> DOCK RECEIPT NO. PRR 387050
> COVERING 8 COILS—"SURFACE
> RUST PAPER COVERING TORN—
> UNCOVERED CAR"
>
> DOCK RECEIPT NO. PRR 387151
> COVERING 8 COILS—"S/R, P/C/T,
> OTC."

The entire shipment was loaded on board the S.S. POLARLAND on or about May 12, 1970 and bills of lading numbered 1, 2 and 3 were issued therefore (Pl. Ex. 4, 5, 6, 546a, 547a, 548a; Pl. Ex. 21a, 21b, 21c, 724a, 726a, 728a).

Each of the bills of lading contained the notation:

> "Outer wrappers athmosperically [sic] rust stained. Outer wrappers slightly damaged. Some bands damaged and/or missing".

When the S.S. POLARLAND arrived at the port of destination, Antwerp, the shipment was surveyed and in-

spected by independent surveyors appointed by cargo and vessel interests during the period June 9th through 13th, 1970, while the 299 coils were still on board the vessel (118a, 119a). Sixteen (16) coils were found heavily ovalized (139a, 140a, 213a) and 182 coils were found damaged, dented, bent, buckled, cut, waved and severly rusted to the extent that they represented a loss in the amount of $30,802.93 (Pl. Ex. 11, 129a, 131a, 134a, 161a, 162a).

Subsequently, a claim was made upon Travelers by Fabrique De Fer for the amount of damage and Travelers paid the amount claimed, together with agency and survey fees in the total sum of $34,059.34 to Fabrique De Fer (Polarland's Ex. B, 107a, 108a, 113a through 115a, 318a, 319a).

The S.S. POLARLAND was, at all times material, owned by D/S A/S Vestland and under charter to Seven Seas. The order of shipper bills of lading which were issued for the shipment were subject to the terms of a charter-party dated March 5, 1970, between Ferrostaal A.G. of Essen* (hereinafter referred to as Ferrostaal) and Seven Seas (Pl. Ex. 13, 592a through 596a), and they were endorsed in blank by Nimpex, the shipper (Pl. Ex. 21a, 21b, 21c, 724a through 728a). The bills of lading were accomplished as follows:

> "New York, N.Y., the 12th May, 1970
> World Shipping, Inc. as Agent only by
> Authority of the Master /s/ J. Reynolds"

In addition, Nimpex had entered into a contract with Seven Seas which provided, among other things, for a freight rate higher than that paid by Seven Seas to Ferrostaal under the aforementioned charter-party, that Seven Seas

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* The complaint was dismissed as to Ferrostaal for lack of jurisdiction.

was the carrier, and that discharging only was to be for the account and risk of the shipper/receiver (Pl. Ex. 14, 597a through 602a). On May 21, 1970, Seven Seas billed Nimpex the sum of $32,085.34 (ocean freight and seaway tolls), for the shipment in question and Seven Seas was paid therefor (Seven Seas Ex. S, 782a, 433a through 435a).

The Law

There is no dispute concerning what law is applicable to this controversy. Defendant-appellant cites in the Table of Contents of its brief, under "Statutes", only the Carriage of Goods by Sea Act (1936) Title 46 U.S.C. §1300 et seq. (COGSA). Since not all appropriate sections were cited and no section was recited in defendant-appellant's brief, plaintiff-appellee recites the following sections which, in its opinion, are all relevant to this case.

§1300. Bill of lading subject to chapter—

> Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter.

§1301. Definitions—

> When used in this chapter—
>
> (a) the term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.
>
> (b) the term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title insofar as such document relates to the carriage of goods

by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

§1302. Duties and rights of carrier—

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

§1303. Responsibilities and liabilities of carrier and ship—

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar

clause, shall be deemed to be a clause relieving the carrier from liability.

POINT I

Seven Seas was a carrier of the subject shipment.

The S.S. POLARLAND was nominated by Seven Seas from Ferrostaal for the purpose of the instant voyage, pursuant to a charter-party dated March 5, 1970 (Pl. Ex. 13, 592a through 596a, 231a through 235a, 237a). That contract, which was signed by Captain Davy Jones, President of Seven Seas for and on its behalf, provided, in pertinent part, for a freight rate of $10.25 per long ton for Cleveland loading/Antwerp discharge; cargo to be loaded, stowed, lashed and discharged by charterers, Seven Seas; for charterers, Seven Seas, to appoint its own broker or agent both at the port of loading and the port of discharge, and for the Captain to sign bills of lading.

Captain Jones admitted, during the course of his testimony, that it was Seven Seas' obligation to load the S.S. POLARLAND under the terms of the charter-party and that he could point to no agreement whereby he passed that obligation on to someone else. (412a through 414a).

Concurrent with Seven Seas' obligations under the charter-party was its contract with Nimpex, the shipper of the subject cargo (Pl. Ex. 14, 597a through 602a) which has been described as a "booking note" (240a, 465a through 471a). This document, which Captain Davy Jones, President of Seven Seas, identified as having been prepared by Seven Seas and bearing his initials (240a, 243a, 467a), described Seven Seas as the "(carriers)". It also provided, in pertinent part, for the carriage of the shipment in question under terms whereby Seven Seas was required to load, stow, lash and shock the shipment at its risk, responsibility

and expense. That portion of the printed contract which mandated the aforementioned functions as the risk, responsibility and expense of the shipper, was stricken out by the party who prepared the contract, Seven Seas (243a, 468a, 469a).

It is absolutely incredible, at this point, for defendant-appellant, Seven Seas to assert, as it does in this Appeal, that the Seven Seas/Nimpex booking note (597a through 602a) was a nullity, when no less than the President of Seven Seas, Captain Davy Jones testified that: Seven Seas prepared the document; Jones signed it on behalf of Seven Seas (240a, 243a, 467a); that he knew Seven Seas had identified itself as the carrier in that agreement; that Seven Seas had, under the terms of that contract assumed the risk, responsibility and expense of stevedoring at loading, and that Seven Seas had a duty to appoint its own agent at both the loading and discharging ports (500a through 502a). In fact Captain Jones testified that he was not only aware of those duties, responsibilities and assumption of risks, but that at the time he signed the booking note he had the then present intent to fulfill those duties, responsibilities and assumption of risks (502a). It is respectfully submitted that this commanding, no nonsense person, Captain Davy Jones, who is accustomed to taking charge; who says what he means and means what he says, did make certain Seven Seas fulfilled those duties, responsibilities and risks it assumed under the booking note.

Complementing Seven Seas' obligations under the charter-party it had with Ferrostaal and the booking note it had with Nimpex were its agency agreement with World Shipping Inc. (236a, 258a, 496a) whereby World was Seven Seas' exclusive agent at Cleveland; and its contract with Great Lakes International Corporation (Polarland Ex. Q, 765a, 766a) which designated Great Lakes as Seven Seas' exclu-

sive stevedore in the port of Cleveland for the 1970 season. There was no evidence that Nimpex had such a contract with Great Lakes, who received and stored the coils on behalf of Seven Seas and subsequently loaded, stowed, lashed and chocked the shipment on board the S.S. POLARLAND and billed Seven Seas accordingly (Polarland Exs. F, G and H, 754a, 755a, 756a). In fact, Mr. Larry Gregg, Vice President of Great Lakes, testified at his deposition that he recognized Nimpex and Seven Seas as being two separate entities (294a), and that with regard to the subject shipment he spoke to or corresponded with only Mr. Friedman, Mr. Reynolds, Mr. Serra and Captain Jones, all of whom he identified as being with Seven Seas (247a, 248a, 294a). It was Captain Jones' testimony that he called Great Lakes personally, and retained them as stevedores for the instant shipment (428a).

Captain Jones testified that World Shipping Inc. was the general agent for Seven Seas at the port of Cleveland (236a, 258a, 496a), and that to his knowledge, World Shipping Inc. had no office in New York (260a). Jones also admitted that Seven Seas would have realized a net profit of eleven or twelve thousand dollars on the shipment if Seven Seas did not owe any dead freight to Ferrostaal (243a). There was no evidence at the trial that Seven Seas had to pay any dead freight. In describing Seven Seas, Captain Jones testified that it held itself out to the public as a carrier (230a), and that Seven Seas treated Nimpex as a preferred customer but otherwise with the same arrangements as any other steel shipper (238a, 239a). Jones identified Seven Seas' invoice number 70064 (Seven Seas Ex. S, 782a), dated May 21, 1970, to Nimpex, as covering the freight charges due Seven Seas for the shipment in question (433a through 435a). He also testified that Seven Seas received the freight proceeds

directly from Nimpex as well as from Phillip Brothers, Inc. whose shipment moved on board the S.S. POLARLAND, Cleveland/Antwerp, on the same voyage as the subject shipment (Seven Seas Ex. T, 783a). Captain Jones identified the signature "J. REYNOLDS" on the bottom of each of the bills of lading as that of John T. Reynolds, Assistant to the President of Seven Seas, and that the bills of lading were signed in the New York offices of Seven Seas by Reynolds (442a, 459a).

The evidence at the trial clearly showed that Seven Seas held itself out to the public as a common carrier; solicited and received merchandise for transportation; chartered the vessel to carry what it received; determined the vessel on which the cargo should go; caused the bills of lading to be signed in its offices by the Assistant to the President and had the duty under the charter-party to employ stevedores and fix the freight. Seven Seas therefore, became a party to the contract of carriage when the bills of lading were signed. *Pendleton* v. *Benner Line* (1917), 246 U.S. 353, 38 S.Ct. 330, 62 L.Ed. 770; *Joseph L. Wilmotte & Co., Inc.* v. *Cobelfret Lines, S.P.R.L.* (M.D. Fla. 1968), 289 F. Supp. 601.

Seven Seas was a carrier as defined by COGSA Title 46 U.S.C. §1301(a), and subject to the responsibilities and liabilities set forth therein (Title 46 U.S.C. §1302).

It is the carrier, who, by law, was required to properly and carefully load, handle, stow and discharge the goods carried (Title 46 U.S.C. §1303[2]), and any agreement in the contract of carriage relieving the carrier or the ship from liability arising from negligence, fault or failure in that obligation is null and void and of no effect. These duties are non-delegable (Title 46 U.S.C. §1303[8]). *Nichimen Company* v. *M.V. Farland* (2d Cir. 1972), 462 F.2d 319.

The cargo, when it was delivered to Great Lakes, Seven Seas' stevedores, was in good order and condition except for those notations on the three aforementioned dock receipts which applied to no more than 26 coils out of the 299 received. The damage found at destination, which consisted of 16 coils heavily ovalized and 182 coils damaged, dented, bent, buckled, cut, waved and severely rusted (Pl. Ex. 11, 129a, 130a, 131a, 134a, 139a, 140a, 161a, 162a, 213a), was of a nature and source different than that noted on the dock receipts when the shipment was received by the carrier, Seven Seas, and for which the carrier is liable if it fails to bring itself within any exceptions relieving it of liability which the law otherwise imposes upon it. *Nichimen Company* v. *M.V. Farland* (2d Cir. 1972), 462 F.2d 319; *Mackey et al.* v. *United States* (2d Cir. 1952), 197 F.2d 241. It is respectfully submitted that Seven Seas failed to prove their freedom from negligence or that the damage was occasioned by one of the "excepted causes" in COGSA (Title 46 U.S.C. §1304[2]).

POINT II

Plaintiff proved its *prima facie* case against Seven Seas for the damage to the cargo.

A. *Proof of good order and condition of the shipment upon delivery to the carrier at the loading port.*

When the 299 coils which made up the instant shipment were received at the Cleveland loading terminal by Great Lakes, the stevedore/terminal operator retained by Seven Seas to handle this shipment (Polarland's Ex. Q, 765a, 428a, 476a, 477a), Great Lakes prepared dock receipts for each rail car of coils as received and notations were made as to the condition of the coils in each rail car (Pl. Ex. 18, 285a through 287a, 294a, 295a).

Only three dock receipts covering 26 coils contained notations concerning the condition of the cargo as received by the stevedore, and even those notations did not involve all of the coils in each respective rail car, nor did they indicate that the bands on all of the coils were broken and/or missing. These three dock receipts contained the following notations.*

DOCK RECEIPT NO. PC 752732
COVERING 10 COILS—"COIL
WRAPPINGS RUSTY & CHAFFED—
CONDITION CONTENTS UNKNOWN"

DOCK RECEIPT NO. PRR 387050
COVERING 8 COILS—"SURFACE
RUST, PAPER COVERING TORN,
UNCOVERED CAR"

DOCK RECEIPT NO. PRR 387151
COVERING 8 COILS—"S/R, P/C/T,
OTC".

Mr. Larry Gregg, Vice President of Great Lakes testified that the notations made on the dock receipts are made at the time the shipment is viewed by the party making the notations, as the cargo is received at the ocean terminal (291a through 295a). Thus, proof of the good order and condition of the coils when received at the ocean terminal by Great Lakes is clearly established.

At this juncture we are compelled to comment on the utilization of "ADDENDUM A" in defendant-appellant's brief as a cunning effort to deceive this Court. Illustrative of this deception is the "Type of Damage Notation" for "Railroad Car No. PC 752732" which is designated as "R, C,

* Mr. Larry Gregg, Vice President of Great Lakes testified at his deposition that he did not know what the term "clause" meant which appeared on several dock receipts (289a).

CU". When reference is made to the "Definitions" contained in this Addendum, we see for "R", "Coil Wrappings Rusty"; for "C", "Chaffed Coil" and for "CU", "Contents unknown". Read together, then, the notations, according to defendant-appellant's attorneys, would be as follows:

> "COIL WRAPPINGS RUSTY, CHAFFED COIL, CONTENTS UNKNOWN"

There is no reference on the dock receipt to the coil itself being chaffed, only the wrappings. This is not an example of literary license but rather a wanton disregard to professional standards of candor and invites the suspicion of this Court to all "short cut" approaches to the evidence in the record as proposed by defendant-appellant's counsel. This includes their lumping the dock receipts together with Great Lakes' receiving record which was prepared after Great Lakes handled the coils (292a).

Comment must also be addressed to Seven Seas' reference to the Peachman "INSPECTION OF LOADING AND STOWAGE" survey (772a) which was *not* admitted into evidence by the Trial Court because it was not properly authenticated (445a through 448a). This loading survey embraced two shipments, hot rolled coils and the instant cargo, cold rolled coils. Attorneys for defendant-appellant at page 25 of its brief, states with regard to this court-excluded report:

> "This survey noted 'distortion of the core' and, apparently, telescoping 'from 0 to 2'; comparable to the ovalization noted at unloading by Travelers' expert (151a-153a, 772a)."

However, when one reads this excluded document we see that the surveyor was not referring to he coils in question when he noted that the "majority of the coils were tele-

scoped from 0″ to 2″, and many of them had their outer laps and edges chain-scored and the core-laps bent due to previous handling." He was in fact describing damages to the hot rolled coils of a different shipment. Clearly another brazen attempt to confound this Court and to direct this Court's attention from the totality of relevant evidence in the record against their client, Seven Seas.

B. *Proof of damage at outturn.*

When the shipment was loaded on board the S.S. POLARLAND, the bills of lading were claused to show the presence of atmospheric rust on the covers, and some bands broken and/or missing (Pl. Ex. 21(a), 21(b), 21(c)). Cargo's surveyor, Mr. Gilles Heureux, and Seven Seas expert, Mr. Harry Reynolds, agreed that the coils were properly packaged for ocean transit (159a, 371a) and Mr. Reynolds testified that neither atmospheric rust on the outer wrappers not broken bands are indicative of damage to the coils (371a, 372a). When the vessel arrived at Antwerp, Mr. Heureux surveyed the subject shipment together with Mr. W. B. Duytschaever, who was retained on behalf of ocean carrier's interest (118a, 119a). Heureux's written survey report, confirmations and photographs were received in evidence (Pl. Exs. 11, 12, 550a through 591a), as was his oral testimony (116a through 168a, 209a through 228a). Heureux said that he found sixteen (16) coils heavily ovalized, which, in his opinion, contained permanent deformations and which were rejected by the consignee (139a, 140a, 213a). They were sold for salvage at a loss of $10,940.80 (161a, 163a through 165a). The balance of the shipment was accepted by the consignee, according to Heureux, including 182 coils which had sustained varying degrees of mechanical damage such as cuts, dents, incisions as well as ovalization, and for which a depreciation allowance or "bonification" in the amount of $19,862.13 was

granted to the consignee. Heureux said that the allowance was, in his opinion, fair and reasonable (Pl. Ex. 11, 129a, 130a, 131a, 134a, 161a, 162a).

It was Mr. Heureux's uncontradicted testimony that he conducted his survey of the shipment at Antwerp jointly with Mr. W. B. Duytschaever, who participated on behalf of vessel's interests (118a, 119a); that in accordance with the custom of the trade at Antwerp, Heureux sent Duytschaever a written report of his findings which Heureux called "a confirmation" (Pl. Ex. 11, 119a, 121a); but Heureux never received a response from Duytschaever which would have been the case if he had disagreed with Heureux's findings as to the nature and extent of cargo damage (122a, 123a, 133a, 134a).

It should be noted at this juncture that neither defendant produced Mr. Duytschaever although Heureux testified that Duytschaever made notes of the damages as observed (121a); but did not furnish Heureux with a copy of his report (122a); and, that at the time Heureux testified at the trial, Duytschaever was still working at Antwerp (210a). As Mr. Justice Story once observed, such nonproduction is "a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the Court." *The Pizarro,* (2 Wheat, 1817) 15 U.S. 227, 241.

In a recent cargo damage case, *United States* v. *Central Gulf Steamship Corporation* (E.D. La., 1970), 321 F.Supp. 945, aff'd (5th Cir. 1972), 456 F.2d 1281, the Court found at page 953, that the defendant's (carrier's) failure to call as witnesses its employees having knowledge of the nature and scope of defendant's inspections and efforts to protect the cargo, and its failure to explain the absence of these witnesses, raises the presumption that the testimony of the employees, if called as witnesses, would have been adverse to the interests of the defendant.

The non-production of material evidence which is in the control of a party raises an inference that that evidence is unfavorable to that party. See, e.g., *United States* v. *Delaware Bay and River Photo Ass'n.*, 44 F.2d 1, 4 (3d Cir.), cert. denied, 283 U.S. 838, 51 S.Ct. 486, 75 L.Ed. 1449 (1930); *The Motor Launch No. 12,* 65 F.Supp. 252, 253 (E.D. Pa. 1946); *J. Gerber & Co.* v. *S.S. Sabine Howaldt,* 437 F.2d 580, 593 (2d Cir. 1971). This rule has been said to be particularly applicable to suits in admiralty, where records are often crucial and records and witnesses often are in the control of one party. *O. F. Shearer & Sons* v. *Cincinnati Marine Service, Inc.,* 279 F.2d 68, 73 (6th Cir. 1960). The inference raised has been said to be sufficient to decide a close case. *Cary-Davis Tug & Barge Co.* v. *United States,* 8 F.2d 324, 325 (9th Cir. 1925).

In general, the measure of damages in cargo claims, where the goods are damaged rather than lost entirely, is the difference between sound market value at the port of destination and the market value of the goods in their damaged condition. *Holden* v. *The S.S. Kendell Fish* (5th Cir. 1968), 395 F.2d 910; *Elia Salzman Tobacco Co.* v. *S.S. Mormacwind* (2d Cir. 1967), 371 F.2d 537. This rule is modified where the goods, damaged during the course of ocean transit, are reconditioned and, after reconditioning, the goods are used for their intended purposes. In such a situation, the damages are limited to reconditioning costs. *Weirton Steel Co.* v. *Isbrandtsen-Moller Co.* (2d Cir. 1942), 126 F.2d 293. At times, the Courts simply make arbitrary adjustments to work substantial justice in conformity with the general rule of compensation of damages, that is, market value at the port of destination. *Pioneer Import Corp.* v. *The Lafcomo* (2d Cir. 1947), 159 F.2d 654, cert. den. (1947), 331 U.S. 821, 91 L.Ed. 1838.

The damaged coils in the instant matter were not reconditioned. The sixteen (16) coils heavily ovalized containing

permanent deformations, were rejected by the consignee (138a, 139a, 140a, 212a, 213a, 227a, 228a), and were sold for salvage at a loss of $10,940.80 (161a through 165a). The 182 coils which suffered severe mechanical damage by cuts, dents, incisions and ovalization were accepted by the consignee at a depreciated value of $19,862.13 which, in the opinion of the cargo surveyor, Mr. Gilles Heureux, was fair and reasonable (129a through 131a, 134a, 161a, 162a). At no time was there any evidence that the damaged goods were reconditioned and subsequently used for their intended purpose with no diminution in value. In fact, it was Mr. Heureux's uncontradicted testimony that the damaged coils represented a loss in quantity and quality of the steel shipped (166a, 167a, 226a through 228a). Heureux testified further that to determine the extent of damage packing had to be removed (215a) and the coils viewed in order to make a proper assessment (142a, 147a, 148a, 223a). Heureaux testified as to the conditions of the contents of the coils, not merely their outer wrappings, and defendants had ample opportunity to cross-examine Heureux during the trial. There is no contradictory testimony in the record by any witness who had examined the shipment in question.

A surveyor's estimate is sufficient to establish the extent of cargo damage. *The Rosalia* (2d Cir. 1920), 264 F. 285; *Empresa Central Marc.* v. *Republic of U.S. of Brazil* (S.D.N.Y. 1957), 147 F. Supp. 778, aff'd (2d Cir. 1958), 257 F.2d 747.

The totality of the evidence concerning the condition of the coils as received by the carrier, Seven Seas, and its stevedore/terminal operator at Cleveland (Pl. Ex. 18); the notations on the bills of lading (Pl. Ex. 21(a), 21(b), 21(c)); and Mr. Gilles Heureux's testimony, report and photos (Pl. Exs. 11, 12) upon delivery by the carrier and the S.S. POLARLAND at Antwerp, clearly proved that the

defendants failed to deliver the cargo at destination in the same good order and condition as received by them at the loading port and that the damage upon redelivery of the cargo was of a different nature and source than that noted upon delivery to the carrier at the loading port. Plaintiff has proved its prima facie case and Seven Seas has not proved its freedom from negligence nor an "excepted cause" under COGSA, Title 46 U.S.C. §1304(2).

POINT III

The Trial Court's findings of fact may not be reversed.

Defendant-appellant has couched the language of the "ISSUES PRESENTED FOR REVIEW" so as to have it appear that questions of law are to be resolved by this appeal. Inherent though, in the arguments they present is their basic disagreement with critical findings of fact made by the Trial Court.

If defendant-appellant, Seven Seas is to succeed in reversing the Trial Court's finding that Seven Seas was the carrier of the subject cargo, then this Court must find error in the Trial Court's findings that:

1. Under the charter-party with Ferrostaal, Seven Seas was obligated to load and stow the cargo.

2. Under the charter-party with Ferrostaal, Seven Seas was obligated to appoint its own broker or agent at the port of loading and discharge.

3. That World Shipping Inc. was Seven Seas' general agent at the port of Cleveland.

4. Under the contract with Nimpex, which Jones admitted he prepared and signed as president of Seven Seas,

Seven Seas assumed the risk and responsibility to load, stow, lash and chock the shipment.

5. That Great Lakes was Seven Seas' exclusive stevedore at Cleveland.

6. That Great Lakes loaded and stowed the subject shipment aboard the S.S. POLARLAND upon the instructions of Seven Seas' President and for and on Seven Seas' behalf.

7. That Seven Seas held itself out to the public as a carrier.

8. That cargoes of other shippers were carried on the voyage in question for which Seven Seas collected freight from those shippers.

9. That J. Reynolds who was Assistant to the President of Seven Seas and who was authorized to sign bills of lading for and on behalf of Seven Seas, was acting within the scope of his authority as an employee of Seven Seas and for and on its behalf in signing the bills of lading issued for the subject shipment.

In addition, if defendant-appellant, Seven Seas, is to succeed in reversing the Trial Court's finding that the damage to the shipment upon arrival at Antwerp was of a nature and source different from that noted on the dock receipts and bills of lading, this Court must find error in the Trial Court's finding as to the adequacy of the uncontroverted in-Court testimony of plaintiff's surveyor, and ignore the legal consequences which naturally flow from the non-production of the witness who had participated in the joint survey of the cargo at Antwerp. It is respectfully submitted that the record is replete with evidence to

support the findings contained in Judge Weinfeld's opinion after trial. The only contrary evidence in the record consists of testimony in conflict with contemporaneous documents and in flat contradiction with that particular witness' own prior statements and admissions.

Rule 52(a) of the Federal Rules of Civil Procedure for the United States District Courts provides that as to actions tried without a jury:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses".

In an often quoted case, Mr. Justice Reed speaking for the United States Supreme Court in the case of *United States* v. *United States Gypsum Co.* (1948), 333 U.S. 364, 395 states:

> "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Clearly then, the Trial Court's finding as to the critical facts in this case may not be reversed. Accordingly, defendant-appellant, Seven Seas cannot prevail in its contention that it is not liable to plaintiff, Travelers, for the damage to the cargo.

CONCLUSION

The judgment entered herein should be affirmed with costs to appellees.

Respectfully submitted,

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Brief ADMITTED

THIS 7th DAY OF April 1977

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